No. 83-1437

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JEFFREY MAREK, THOMAS WADYCKI
and LAWRENCE RHODE,

Petitioners,

vs.

ALFRED W. CHESNY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether those attorney's fees of a civil rights plaintiff which are incurred after an offer of judgment (Fed. R. Civ. P. 68) must be paid by the defendant under the Civil Rights Attorney's Fees Awards Act (Title 42 U.S.C. § 1988), when the plaintiff rejects the defendant's valid Rule 68 offer of judgment and then fails to recover an amount on verdict in excess of the defendant's offer.

2. Whether attorney's fees' already paid to an attorney for a civil rights plaintiff under a contingent fee contract with plaintiff, should be disregarded by the district court in awarding "a reasonable attorney's fee" under Title 42 U.S.C. § 1988, although the contingent fee contract in violation of the local rule for the district court was not filed and was not disclosed on the record until the oral argument in the United States Court of Appeals.

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OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals (Pet. A. A1-11) is reported at 720 F. 2d 474 (7th Cir. 1983).

The opinion of the district court (Pet. A. B1-12) is reported at 547 F. Supp. 542 (N.D. Ill. 1982).

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[1] The authors gratefully acknowledge the contributions and suggestions made by Professor Roy D. Simon, Jr., Assistant Professor of Law, Washington University School of Law, during the preparation of the Brief.

JURISDICTION

Judgment of the Seventh Circuit Court of Appeals was entered on November 3, 1983. (J.A. 11) A petition for rehearing *en banc* was denied on January 20, 1984 with Justices Bauer, Coffey and Pell dissenting. (J.A. 12). On February 29, 1984, the Petition for a Writ of Certiorari was filed with the Supreme Court of the United States. (J.A. 13) Jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1254(a). On April 23, 1984, the Petition for a Writ of Certiorari to the Seventh Circuit Court of Appeals was granted by the United States Supreme Court. (J.A. 13)

STATUTES INVOLVED

United States Code, Title 42, § 1988 as amended. Proceedings in vindication of civil rights; attorney's fees.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against the law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of § 1981, 1982, 1983, 1985, and 1986 of this title, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964,

the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Federal Rules of Civil Procedure, Rule 68. Offer of Judgment.

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with the proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

General Rule 39 of the United States District Court, Northern District of Illinois Eastern Division appears in Pet. A. D.

STATEMENT OF THE CASE

The petitioners Jeffrey Marek, Thomas Wadycki and Lawrence Rhode are police officers employed by the Village of Berkley, located in Cook County, Illinois. (R. 1) On October 5, 1979, a civil rights action was filed by Alfred Chesny, Sr., whose adult son had been killed during a confrontation with the three officers. (R. 1) The Village of Berkley, the village president, and the police chief were also named as defendants. (R. 1)

Before a pre-trial was held (J.A. 3-4), petitioners submitted an offer of judgment pursuant to Rule 68 to respondent's attorney (J.A. 16-17). This offer of judgment, transmitted to the respondent on November 5, 1981, stated as follows:

> Pursuant to Federal Rule of Civil Procedure 68, the defendants Jeffery Marek, Thomas Wadycki and Lawrence Rhode, hereby offer to allow judgment to be taken against them by the plaintiff for a sum, including costs now accrued and attorney's fees, of One Hundred Thousand ($100,000) Dollars. (J.A. 17).

The respondent failed to accept the offer of judgment. Five and one-half months later, on April 19, 1982, a jury trial was begun (J.A. 4). The jury did return a verdict for the respondent and against the three police officers but only for a total of $60,000. (R. 119) The sum of $5,000 was awarded for the "wrongful death", the sum of $52,000 for violation of civil rights and a sum in total of $3,000 for punitive damages. (R. 119) The Village of Berkley and the police chief were found not guilty (J.A. 6). The village president, Leslie David, was granted a directed verdict (R. 118).

The petitioners tendered payment of judgment on verdict, which respondents refused (R. 122). The monies were deposited with the clerk of court in accord with order of the court (R. 122). During the pendency of the post trial motions, the petitioners and the respondent with the court's prompting (Pet. A. B-11) agreed that the respondent's attorney's fees for the legal work done prior to the November 1981 offer of judgment, totalled $32,000 (J.A. 10). This sum was a compromise from the respondent's fee petition of $34,392.35 (J.A. 24). The $32,000 was paid by the petitioners to the respondent under the court's award of that amount under § 1988 (J.A. 24).

The respondent by post-trial motion demanded that his attorney's fees accrued after the November, 1981 offer of judgment through the trial be paid by the petitioners (R. 139). These additional fees were claimed to be about $171,000 (R. 139).

The petitioners interposed an objection to the payment of post-offer fees and filed the Rule 68 offer of judgment with the court (R. 144). The verdict of $60,000 did not exceed the $100,000 offer. The trial court assumed that the respondent's judgment was not more favorable than the petitioner's offer (Pet. A. B-9). The petitioners urged the trial court to hold that the respondent's post-offer of judgment attorney's fees, defined as part of § 1988 costs, should remain the respondent's responsibility (R. 144).

In its memorandum opinion ruling on this issue, the district court agreed with petitioners. (Pet. A. B-9) The district court held that the term "costs" in Rule 68 should include attorney's fees within the meaning of Title 42 U.S.C. § 1988, which specifically states that attorney's fees may be allowed by the court in its discretion "as part of the costs". (Pet. A. B-9) Judge Shadur held that the respondent is precluded from recovering his attorney's fees for work performed post-offer of judgment, since the judgment obtained was not more favorable than the offer. (Pet. A. B6-9) In deciding the issue, Judge Shadur relied upon *Waters* v. *Heublein, Inc.*, 485 F. Supp. 110 (N.D. Cal. 1979). (Pet. A. B-7-9).

The district court in the memorandum opinion also analyzed the policy considerations behind § 1983 and the congressional encouragement of "vigorous enforcement". (Pet. B-9). In holding that the *Waters* result is proper and that the inclusion of attorney's fees as part of the costs under Rule 68 upholds the congressional intent of § 1988, the district court stated that it was not going to "adopt a wrong rule because the right one may have a harsh application in a few cases". (Pet. A. B-9). While emphasizing the policy considerations behind § 1988, Judge Shadur also cited with approval the strong policy considerations of promoting settlement of litigation. (Pet. A. B-9)

The case was appealed by the respondent to the United States Court of Appeals. (J.A. 10) The Seventh Circuit reversed Judge Shadur's opinion. (J.A. 11) In its opinion, (Pet. A. A1-11) the Seventh Circuit found reversal to be necessary, because of its view of the congressional policy behind the Civil Rights Attorney's Awards Fees Act, 42 U.S.C. § 1988. The Seventh Circuit expressed concern that a "little known and little used" rule from the Federal Rules of Civil Procedure should not be allowed to undercut claims for fees by plaintiffs' civil rights attorneys. (Pet. A. A-2, 10). In reaching this conclusion, the Seventh Circuit did not follow *Fulps* v. *City of Springfield,* 715 F. 2d 1088 (6th Cir. 1983) which held that the word "costs" in Rule 68 does include attorney's fees when an applicable statute such as § 1988 allows attorney's fees to be taxed as costs to the prevailing party. (Pet. A. A-10, 11). According to the opinion, the decisive precedent for not following *Fulps* is this Court's opinion in *Roadway Express Inc.* v. *Piper,* 447 U.S. 752 (1980). (Pet. A. A-11) *Roadway Express* held that the costs, defined in 28 U.S.C. § 1920, which may be assessed against an attorney who so multiplies the proceedings unreasonably and vexatiously (under § 1927), did not include

attorney's fees in a civil rights case. (Pet. A. A-11) Accordingly, the Seventh Circuit held on November 3, 1983, that the respondent should receive an award of all fees for services beyond the offer of judgment date. (Pet. A. A-11) The case was remanded to the district court to determine a reasonable fee for those services. (Pet. A. A-11).

The respondent's attorney in oral argument before the court of appeals on June 3, 1983, revealed on the record that he had a written, contingent fee contract with his client (Pet. A. A-6). This agreement had not been filed with the United States District Court, contrary to General Rule 39 for the Northern District of Illinois which requires that any contingent fee agreement be filed at the time the complaint is filed with the clerk of the district court (Pet. A. D; J.A. 46). The terms of the agreement were finally disclosed (J. A. 51), after the petitioners filed a petition for rehearing *en banc* in the Seventh Circuit based in part upon the respondent's failure to advise anyone of the contingent fee agreement. (J. A. 34-35). The petitioners contended in the petition for rehearing *en banc* that the contingent fee agreement is a significant factor to be considered in assessing any reasonable attorney's fee under § 1988 (J.A. 36). After receiving an answer from the respondent to the petition for rehearing, (J.A. 39), the Seventh Circuit denied the petition for rehearing *en banc* with three justices dissenting (Pet. A. C-1).

SUMMARY OF ARGUMENT

I. In this case, petitioners, defendants in the district court, made a Rule 68 offer of judgment which included the attorney's fees for the civil rights plaintiff as part of the costs. Respondent did not accept the offer, which ultimately proved to be greater than the sum of the jury verdict plus respondent's fee award for pre-offer legal work. The Seventh Circuit opinion held, notwithstanding Rule 68, that respondent can recover his post-offer of judgment attorney's fees under § 1988, because the denial of such fees would blunt the effectiveness of the Civil Rights Act of 1964 and would be contrary to congressional policy. 42 USC, § 1983, § 1988.

The petitioners' position is that the express congressional intent of § 1988 was to allow § 1988 attorney's fees to be paid to prevailing civil rights plaintiffs, but only within the framework of federal procedure.

Because of its express definition of "attorney's fees as part of the costs" and because of congressional commentary that attorney's fees be taxed "like other items of costs", § 1988 clearly contemplates a boundary on the term "attorney's fees". That boundary line is drawn by the Federal Rules of Civil Procedure, including Rule 68, which should govern civil rights cases.

Rule 68 and § 1988 can and should harmonize with each other. Rule 68's sole purpose is to settle protracted litigation. *Delta Air Lines, Inc.* v. *August,* 450 U.S. 346 (1981). The purpose of the Rule, however, is negated by the circuit court opinion. Plaintiff's civil rights attorneys have now been, in effect, instructed by the Seventh Circuit to ignore Rule 68 offers of judgment, since the only "cost" of any significance—plaintiff's attorney's fees—will still be paid by defendants.

If Rule 68 and § 1988 are interpreted correctly, the Seventh Circuit's concern that congressional policy will be thwarted can be satisfied. Rule 68 promotes the vindication of the civil rights statutes by its very operation. Its acceptance immediately elevates plaintiff to the status of "prevailing party", which is certainly a higher position, when he accepts an offer, than his previous position. Rule 68 to be valid, while effective, must accomplish two goals: it must vindicate plaintiff's civil rights and it must compensate plaintiff's attorney for fees as part of the costs. This interpretation of § 1988's interaction with Rule 68 is in accord with numerous district court opinions and the Sixth Circuit Court of Appeals. *Fulps* v. *City of Springfield,* 715 Fed. 1088 (6th Cir. 1983).

In contrast, the Seventh Circuit's opinion in the instant case misapprehends a holding of this Court of when fees are to be considered as "costs", *Roadway Express, Inc.* v. *Piper,* 447 U.S. 752 (1980). The Circuit Court, also, fails to cite or rely on the relevant holding in *Hutto* v. *Finney,* 437 U.S. 678 (1977), where the correct view that "costs" include fees in a civil rights action is set forth.

II. Contingent attorney's fees must be considered in determining what is a reasonable attorney's fee under § 1988. Otherwise, a windfall profit can result. The policy of § 1988 is to vindicate civil rights by securing effective legal representation. It is not a policy to award unreasonable fees or to instigate suits to benefit lawyers. The respondent has already received a substantial attorney's fee which should be taken into account before any further fee award is made. The reasonable fee standard of *Hensley* v. *Eckerhart,* ____ U.S. ____, 103 S.Ct. 1933 (1983), is not satisfied unless the contingent fee paid is taken into account by the district court.

ARGUMENT

I. THE VINDICATION OF A PLAINTIFF'S CIVIL RIGHTS IS NEITHER HAMPERED NOR DETERRED BY CONSTRUING STATUTORY ATTORNEY'S FEES AS PART OF THE COSTS UNDER 42 U.S.C. § 1988 AND RULE 68.

A. RULE 68 SHOULD EXIST IN HARMONY WITH § 1988, IF THE INTENT OF BOTH LAWS IS TO BE UPHELD.

Section 1988 of the Civil Rights Attorneys' Fees Awards Act of 1976 provides that the trial court in its discretion may allow a "prevailing party" in a civil rights case a "reasonable attorney's fee as part of the costs." Rule 68 of the Federal Rules of Civil Procedure provides that, if a plaintiff in a federal civil case rejects an offer by the defendant to allow judgment to be taken against the defendant and if the plaintiff later obtains a judgment less favorable than the offer, then the plaintiff "must pay the costs incurred after the making of the offer."

The case at bar involves a civil rights plaintiff's rejection of a Rule 68 offer of judgment. That offer did expressly include attorney's fees as part of costs offered. The amount of the subsequent jury verdict plus the amount of pre-offer attorney's fees awarded by the district court totalled less than the amount of defendant's offer of judgment.

The petitioners here, who were the defendants in the trial court, present the question of whether the post-offer costs which the respondent must now bear include respondent's own "attorney's fees as part of the costs". 42 U.S.C. § 1988.

The facts of this case, under both the law and expressed congressional policies, mandate that the post-offer of judgment attorney's fees are "part of the costs" which the respondent must absorb. When respondent chose to reject an offer of

judgment which turned out to be more favorable than the subsequent verdict he won, plus the pre-offer fee which he was awarded, shifting of his post-offer attorney's fees was barred.

Rule 68 became part of the Federal Rules of Civil Procedure in 1938.[2] Thirty-eight years later, Congress enacted § 1988 with its specific statutory language that defines costs to include attorney's fees. Neither Rule 68 nor § 1988 was enacted in a vacuum. Fundamental legislative principles establish that statutes should harmonize with one another and apply in a consistent fashion. *Kokoszka* v. *Bedford*, 417 U.S. 642 (1974). The interpretation of § 1988 must be viewed within the framework of previously existing statutes and procedural rules. Judicial rulings should not create disharmony between the Civil Rights Acts and the Federal Rules of Civil Procedure, where conflict need not exist. Nor should judicial rulings elevate § 1988 beyond the reach of the federal court's procedural rules which were established to govern "all suits of a civil nature. . . ." Fed. R. Civ. P.1[3]

To construe § 1988 as exempt from certain Federal Rules of Civil Procedure would be precedent for havoc in the federal judicial system. Undermining the structure of federal civil procedure would be the result of such construction.

The simplest and most basic solution to the case at bar is found by reading the plain language of the two laws involved. Attorney's fees are defined "as part of the costs" which a court may award under § 1988. The costs are the plaintiff's, not

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[2] The Rule was amended in 1948 and again in 1966. The language of the Rule itself is derived from three state statutes from Minnesota, Montana and New York, which statutes were in existence prior to the enactment of the Federal Rule 68. 2 Minn. Stat. § 9323 (Mason 1927); 4 Mont. Rev. Codes Ann. § 9770 (1935); N.Y. Civ. Prac. Law § 177 (Cahill 1937).

[3] Fed. R. Civ. P. 1 provides: "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

defendant's obligation, after he rejects a Rule 68 offer of judgment and then recovers less on judgment. The obligation is not discretionary: the plaintiff *must* pay the costs under Rule 68's language; and part of those costs are his own attorney's fees incurred post-offer of judgment. While the Seventh Circuit rejected this approach in the case at bar by labeling it "mechanical" it is the one and the only approach which can harmonize the legislative intent of the statute with the rule of procedure to assure a unified, comprehensive judicial process.

The harmony of this approach is adopted by the Sixth Circuit in *Fulps* v. *City of Springfield*, 715 F. 2d 1088 (6th Cir. 1983), which held:

> When Congress drafted 42 U.S.C. § 1988, it described attorney's fees as "part of the costs". Congress could have simply authorized the recovery of attorney's fees, but it chose to go further and characterize the fees as costs. Required as we are to construe the language of the statute so as to avoid making any word meaningless or superfluous, we conclude that Congress expressly characterized fees as costs with the intent that the recovery of fees be governed by the substantive and procedural rules applicable to costs. *Id.* at 1092-93.

The Sixth Circuit went on to conclude that a Rule 68 offer of judgment on a civil rights case will preclude the plaintiff from recovering attorney's fees after the offer of judgment, when the plaintiff recovers less on judgment than the amount of the offer.

When petitioners in the case at bar made the offer of judgment on November 5, 1982, they had to rely upon the language of Rule 68 and § 1988 and to harmonize one with the other. Especially here, the power to shape and articulate just rules of law in an adversary context is at the command of this Court. The adversary process must be subject to the orderly administration of justice under law, using rules of procedure. In obedience to Rule 68, the petitioners' offer of judgment not only would make the respondent whole, but would reasonably compensate the respondent's attorney. As a result, the offer

also honors and fully satisfies § 1988 of the Civil Rights Act. Construing attorney's fees to be part of the costs which become the plaintiff's own responsibility after the rejected offer of judgment, can only promote the litigation settlement policies underlying Rule 68. The Civil Rights Act and the Federal Rules of Civil Procedure should be found to be in harmony.

B. RULE 68 IS A LONGSTANDING PART OF THE UNIFIED, COMPREHENSIVE LAW OF FEDERAL CIVIL PROCEDURE.

Rule 68 has been part of the fabric of the Federal Rules of Civil Procedure for over 40 years. Its sole purpose is the promotion of settlements and the termination of protracted litigation.[4] *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 352 (1981). 12 C. Wright & A. Miller, Fed. Prac. and Proc. §§ 3001-3005 (1973). While pre-trial and discovery rules can promote settlement, Rule 68 has had the unique distinction, since its inception, of being the only federal rule of procedure enacted solely to facilitate the settlement of lawsuits.[5]

The procedure in using Rule 68 is simple. The defendant may serve an offer not less than 10 days before trial upon plaintiff to allow judgment to be taken against the defendant, "for the money or property or to the effect specified in his offer, with costs then accrued." Fed. R. Civ. P. 68. Plaintiff then has 10 days to accept the offer, which if not accepted is deemed withdrawn. It is a simple, straightforward procedure, available to defendants only.

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[4] Professor A.M. Dobie observed in 1939: "This provision [Rule 68] in a case involving some doubt might strongly influence the plaintiff to accept the defendant's offer; or, if the offer is not accepted, it, of course, relieves the offering defendant of the burden of future costs, thereby constituting an inducement to the making of such offers." Dobie, *The Federal Rules of Civil Procedure*, 25 Va. L. Rev. 261, 304, n. 195 (1939).

[5] As part of the 1983 amendments to the Federal Rules of Civil Procedure, Rule 16 now expressly designates a function of pre-trial to be to facilitate settlement. Prior to this new amendment, Rule 68 stood alone as the one officially expressed method of dispute resolution under the Federal Rules of Civil Procedure.

The results of a rejected offer of judgment are mandatory: ". . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree *must pay the costs incurred* after the making of the offer." (emphasis added). Such language leaves no ambiguity as to the plaintiff's duty. *See, Delta Air Lines* v. *August,* 450 U.S. 346 (1980) (Rehnquist, J. dissenting).

In the case at bar, the letter and spirit of Rule 68 were followed precisely by petitioners. The offer of judgment was made by petitioners five and a half months before trial, specifying a sum of $100,000, including attorney's fees as part of "the costs then accrued". The offer of judgment was submitted by petitioners in an effort to resolve the lawsuit through settlement. The respondent disregarded the offer. At the end of a three week jury trial, the jury awarded respondent a total of $60,000. Pre-offer attorney's fees of $32,000 were agreed upon by the parties and approved by the court. Thus, respondent won $8,000 less after trial than the $100,000 offer of judgment. The respondent's total recovery was $92,000, which is an amount "not more favorable than the offer." Fed. R. Civ. P. 68.

The opinion in the Seventh Circuit Court of Appeals, in this case derogates Rule 68 as "little known and little used." While the court expressed its annoyance, as if Rule 68 were a thorn in the side of § 1988, it does concede that Rule 68 is not "inflexibly drafted" and can easily encompass the statutory award of attorney's fees to prevailing parties. *Chesny* v. *Marek,* 720 F. 2d 474, 477 (7th Cir. 1983).

Petitioners would concur with the interpretation of federal procedure by the Seventh Circuit to the extent that the offer of judgment here made by the petitioners is valid in its inclusion of attorney's fees as part of the offer in the Seventh Circuit's view. A Rule 68 offer, because it allows judgment to be entered, would not be feasible in the face of a fee statute such as § 1988,

if the offer could not encompass all potential liabilities of the defendant in the lawsuit. Any civil rights defendant competently advised would balk at authorizing judgment to be entered against himself, if attorney's fees of an unknown amount would later be imposed upon him, because his accepted offer has made plaintiff a "prevailing party". In the instant case, the offer of judgment was made with the intent that the amount offered would terminate the lawsuit completely, with no further litigation costs or attorney's fees incurred by either side.

While the validity of petitioners' offer is upheld, the Seventh Circuit speculates that including attorneys' fees as part of the costs "would not have occurred to the draftsmen of Rule 68, because the award of attorney's fees to prevailing plaintiffs was uncommon in 1938, although not unknown—the copyright, securities, and antitrust statutes all allowed such awards." 720 F. 2d at 477. However, a closer reading of federal statutory history shows that federal laws providing for attorney's fees awards to prevailing parties were much more common in 1938 than the court of appeals opinion discloses. At least a dozen federal statutory provisions in nine different federal acts on the books in 1938 allowed the prevailing party to obtain an award of his attorneys' fees.[6] These dozen statutes included not only antitrust,[7] securities,[8] and copyright laws,[9] but also included the Communications Act of 1934, 47 U.S.C. §§ 206 & 407; the Merchant Marine Act of 1936, 46 U.S.C. § 1227; the Packers and Stockyards Act, 7 U.S.C. § 210(f) (1921); the Perishable

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[6] Appendix A to this brief contains a list of statutory provisions existing in 1938 which allowed a court to make an award of attorney's fees under the rubric of "costs." The *amicus* brief of the Solicitor General identifies 21 federal statutes (out of 27 attorney fee statutes) which in 1938 described fees as "costs." All are currently in force.

[7] Clayton Act, 15 U.S.C. § 15 (1914).

[8] Securities Act of 1933, 15 U.S.C. § 77(e) and Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e) & 78r(a)

[9] Copyright Act of 1909, 17 U.S.C. § 40. This provision has since been replaced by § 505 of the Copyright Act of 1976, 17 U.S.C. § 505, which uses virtually identical language.

Agricultural Commodities Act, 7 U.S.C. §§ 499g(b) & (c) (1930); the Railway Labor Act, 45 U.S.C. § 153(p) (1926); and the Unfair Competition Act, 15 U.S.C. § 72 (1916).

Most significant, every one of the twelve statutes, allowing attorney's fees awards in 1938, included and defined attorney's fees as part of the "costs." Section 407 of the Communications Act of 1934, 47 U.S.C. § 407, for example, provided, in pertinent part:

> If the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

Section 210(f) of the Packers and Stockyards Act, 7 U.S.C. § 210(f), used the identical language, as did Section 499g(b) of the Perishable Agricultural Commodities Act, 7 U.S.C. § 499g(b), and Section 153(p) of the Railway Labor Act, 45 U.S.C. § 153(p). Even more striking, in relation to § 1988 of the Civil Rights Act, was Section 40 of the Copyright Act of 1909, 17 U.S.C. § 40 (1940 ed.), which provided that a court could "award to the prevailing party a reasonable attorney's fee as part of the costs"—language virtually identical to § 1988."

The drafters of Rule 68 could not have been oblivious to these many federal statutory provisions allowing an award of attorney's fees "as part of the costs," which language was subsequently approved by Congress. The drafters must have realized and intended that Rule 68's reference to "costs" would include attorney's fees where Congress had frequently provided that attorney's fees were to be taxed and collected "as part of the costs." Rule 68 was not enacted in a vacuum.

C. ENACTMENT OF THE RIGHT TO ATTORNEY'S FEES UNDER § 1988 ASSUMES THE PROCEDURES OF THE FEDERAL COURTS AS THEN EXISTING.

The passage of § 1988 in 1976 was triggered by this Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975) requiring Congress, not the courts,

to decide when and if fees should be shifted. Congress came to recognize that individual civil rights litigants would assume the laudable role of "private attorney generals" to vindicate congressional civil rights policies. Private litigation was viewed as a key factor in the enforcement scheme. Senate Report 94-1011, 1976 U.S. Code Cong. & Admin. News 5908. (hereinafter cited as Sen. Rep. 94-1011). The concept of fee shifting, which requires the defendant to pay the prevailing plaintiff's attorney, furthers the policy concept of enforcing fundamental civil rights through the litigation of good faith, meritorious causes of action.

Prior to the *Alyeska* opinion and to the passage of § 1988, the Senate Judiciary Committee in 1973 had held six days of hearings on the legal fees issues before the Subcommittee of the Representation of Citizen Interests. In 1976 the Committee's 1973 proceedings were adopted and published as Sen. Rep. 94-1011. According to the Subcommittee Report, over 30 witnesses testified, including state and federal public officials, scholars, practicing attorneys and private citizens. Written material was submitted by the American Bar Association, the District of Columbia Bar Association and 22 state bar associations. Sen. Rep. 94-1011 at 5909. The Senate Report states: "The purpose and effect of [§ 1988] are simple—it is designed to allow courts to provide the *familiar* remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866." Sen. Rep. 94-1011, at 5910. (emphasis added.) The Report further explains: "We have, since 1870, authorized fee shifting under more than 50 laws. . . . In cases under these laws, fees are an integral part of the remedy necessary to achieve compliance with our statutory policies." Sen. Rep. 94-1011 at 5910.

The legislative enactment of fee shifting was for the purpose of attracting competent counsel to represent civil rights litigants. This purpose has been achieved in the case at bar with the employment of competent, experienced counsel, as demonstrated by the affidavit of respondent's attorney, which

lists his outstanding qualifications. J. A. A-18-22. The legislative purpose was not to produce "windfall" fees to attorneys. As the Senate Report notes: "These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, "for all time reasonably expended on a matter. [cites omitted]" Sen. Rep. 94-1011, at 5913. In analysing this congressional purpose, the Tenth Circuit subsequently stated:

> The caution against 'windfalls' for attorneys shows that Congress was exclusively interested in making civil rights actions more attractive to prospective plaintiffs. Congress was not trying to get these cases into court by making them lucrative to attorneys. Therefore, an award of attorney's fees which benefits a plaintiff's attorney rather than a plaintiff does not further congressional policy. *Cooper v. Singer,* 689 F. 2d 929, 931 (10th Cir. 1982)[10]

The fee shifting provisions were designed to encourage private attorneys in bringing meritorious suits, even though the total damage amount might be small or the relief requested might be injunctive in nature. *Sisco* v. *J.S. Alberici Const. Co., Inc.,* ____ F. 2d. ____, Slip. Op. 83-1757 (8th Cir. April 24, 1984).

After the extensive hearings held by the Senate and the House Committees, § 1988 was passed with the language that the reasonable attorney's fees would be assessed for the prevailing party "as part of the costs." Congress was not naive in drafting fee shifting statutes. The numerous fee statutes that have preceded or followed § 1988 manifest sophisticated, knowledgeable congressional initiatives in designating fees "as part of the costs" to serve legislative purposes. Numerous statutes utilize similar, and sometimes the same language as § 1988 to define the fees to be shifted "as part of the costs".

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[10] This opinion in *Cooper* v. *Singer* was subsequently reviewed by the Tenth Circuit pursuant to a petition for rehearing *en banc.* The opinion on rehearing is reported in *Cooper* v. *Singer,* 719 F. 2d 1496 (10th Cir. 1983).

At least sixty-nine federal statutory provisions currently provide for a court award of attorney's fees under the rubric of "costs."[11] At least seven of the sixty-nine attorney's fee award provisions define attorney's fees as costs in language identical to § 1988, allowing the court to award "a reasonable attorney's fee as part of the costs.[12] The numbers may be substantially higher.[13] At least five other statutory provisions among the sixty-nine use language nearly identical to § 1988.[14] The holding in this case will thus have an impact on provisions of the United States Code far beyond § 1988. If the opinion of the

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[11] The complete text of these 69 statutory provisions is reprinted in Appendix B to this brief.

[12] Statutes allowing an award of "a reasonable attorney's fee as part of the costs" are: the Agricultural Unfair Trade Practices Act, 7 U.S.C. § 2305 (enacted in 1968); Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(3)(b) (enacted 1964); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (enacted 1964); the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (as amended in 1980); the Copyright Act of 1976, 17 U.S.C. § 505; the Jury System Improvement Act of 1978, 28 U.S.C. § 1875(d)(2); the Rehabilitation Act of 1973, 29 U.S.C. § 794a(b) (enacted in 1978); and the Voting Rights Act amendments of 1975, 42 U.S.C. § 1973(1)(c). Except for the Copyright Act of 1976 and the Jury System Improvement Act of 1978, all of the statutes just listed also mimic 42 U.S.C. § 1988 by providing that the court "in its discretion" may make the award to the "prevailing party."

[13] The *amicus* brief of the Solicitor General identifies 142 federal attorney fee statutes and reports that fees are described as part of "costs" in 92 of them.

[14] The five statutes using language similar to § 1988 are found in the Communications Act of 1934, 47 U.S.C. § 206 ("attorney's fees shall be taxed and collected as part of the costs in the case") and 47 U.S.C. § 407 ("If the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit"); the Perishable Agricultural Commodities Act, 7 U.S.C. § 499g(b) ("If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as part of the costs of the suit"); and the Securities Act of 1933, 15 U.S.C. § 77k(e) (court may, in its discretion, award costs of suit, including a reasonable attorney's fee, "such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard".)

court of appeals is affirmed, a valid Rule 68 offer will provide no incentive for the offeree to settle in any case brought under one of the sixty-nine attorney's fees award statutes. Each statute under the Seventh Circuit analysis would be "substantive", foreclosing the use of Rule 68 which is "procedural". On the other hand, under any of the 69 statutes, if "costs" in Rule 68 are defined to exclude attorney's fees, then the offeree will almost always disregard Rule 68. He will do so, because he will be able to finance any award of costs made against him under Rule 68 (should the offeree fail to finally obtain a judgment more favorable than the offer) out of the attorney's fees award which he will receive so long as he is the "prevailing party".

The impact which an affirmance here could have on litigation in the federal courts can be roughly quantified. Over 20% of all civil cases commenced in the United States district courts during the twelve month period ended June 30, 1983 potentially involved awards of attorney's fees as part of the costs under § 1988 or some other federal statute. *Annual Report of the Director of the Administrative Office of the United States Courts* 122-123 (1983) (hereinafter "1983 *Annual Report*").[15] Since the Federal Rules of Civil Procedure "govern the procedure in the United States district courts in all suits of a civil nature," Fed. R. Civ. P. 1, it is clear that Rule 68 may play

[15] A chart on page 123 of the 1983 *Annual Report* gives the following breakdown for civil cases commenced in federal district courts during the 12 month period ended June 30, 1983: State prisoner petitions, 10.9%; federal prisoner petitioners, 1.8%; civil rights cases, 8.2%; and antitrust cases, 0.5%—all of which add up to a total of 21.4% of the 241,842 civil cases filed in federal district courts during that period. This amounts to approximately 51,750 cases covered by either 42 U.S.C. § 1988 or by the Clayton Act, 15 U.S.C. § 15. A more detailed listing on page 122 of the 1983 *Annual Report* (Table 18) shows that an additional 19,361 cases were brought during the same 12 month period under federal labor laws (11,033 suits) patent, copyright, and trademark laws (5,413 suits), and securities commodities, and exchange laws (2,915 suits), many of which were undoubtedly brought under federal statutes allowing an award of attorney's fees to a prevailing party.

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a part in all civil cases covered by statutes that award attorney's fees as part of the costs. Even if this Court's opinion on Rule 68 in the instant case were to apply only to § 1988 cases, that opinion can have a positive effect on overloaded federal trial court calendars.

What is patently apparent in § 1988's congressional history is the existence of obvious concern that these many thousands of civil cases do not become a vehicle for attorneys to subsidize a law practice with "harassing litigation and its potential for intimidation of defendants." *Pulliam* v. *Allen*, ____ U.S. ____, 52 U.S.L.W. 4525 (1984) (Powell J., dissenting). The "lure of substantial fees", which can easily become the single largest expense of the litigation,[16] was not countenanced by Congress with the enactment of § 1988. *Id.* at 4535. Sen. Rep. 94-1011, at 5913. However, in the courthouse the "lure of substantial fees" on marginal civil rights cases has now begun to clog dockets and undercut both the general litigants' and the public's "overriding" interest "in settlement rather than the exhaustion of protracted court proceedings". *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 363 (1980) (Powell, J. con-

Footnote continued from preceding page.

Moreover, since 42 U.S.C. § 1988 applies not only to suits alleging constitutional violations but also to suits alleging violations of the statutes or laws" of the United States, *Maine* v. *Thiboutot*, 448 U.S.C. 1 (1980), there are probably thousands of additional suits in which the prevailing party is eligible for attorney's fees under § 1988 but which cannot be broken out of the statistics in the 1983 *Annual Report*. The same may be true of federal cases lumped together in the 1983 *Annual Report* under the heading of "Other Statutory," accounting for 9.9% of civil cases filed in federal district courts during the 12 months ended June 30, 1983.

Reading all of these statistics together, it is estimated that upwards of one-third of all federal civil cases are covered by federal statutory provisions authorizing an award of attorney's fees to the prevailing party as part of the "costs."

[16] *See*, Note, The Impact of Proposed Rule 68 on Civil Rights Litigation, 84 Column L. Rev. 719 (1984).

Footnote continued on following page.

curring). The exacerbation of the problem by the holding in the case at bar is caused by the guarantee of a post-offer fee, irrespective of whether, in practical terms, plaintiff wins or loses.

A solution appears beyond reach under the decisional law of the Seventh Circuit. For example, in *Skoda* v. *Fontani,* 519 F. Supp. 309 (N.D. Ill. 1981) a jury awarded the plaintiffs $1.00 each as civil rights damages. The district court then ruled that an award of attorney's fees and costs should be denied. The court saw the verdict to be a "special circumstance" under *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400 (1968), especially since the only circumstance hindering a pre-trial settlement had been the attorney's fees demand of plaintiff's counsel. In reversing the trial court the opinion in the Seventh Circuit held that, since the plaintiffs were prevailing parties under 42 U.S.C. § 1988, the district court had to award attorney's fees.[17] *Skoda* v. *Fontani,* 646 F. 2d 1193 (7th Cir. 1981). Obedient to instruction, on remand, District Court Judge Marvin Aspen reluctantly awarded the plaintiff's attorney the sum of $6,086.12, including attorney's fees and costs. Judge Aspen sagely commented "... it is doubtful that Congress envisioned that § 1988 would become the catalyst for litigating a claim which otherwise would be settled." *Skoda* v. *Fontani,*

Footnote continued from preceding page.

In *Chesny* v. *Marek,* 720 F. 2d 474 (7th Cir. 1983), the respondent has now claimed post-offer of judgment fees of approximately $250,000, through the appeal, in addition to the previously paid $32,000 for pre-offer of judgment fees. The respondent, if he prevails, would thus receive about $282,000 in fees in a case the jury found to be worth only $60,000.

[17] The Seventh Circuit has evolved other judicial pronouncements on the basis of $1.00 verdicts. In *Pigeaud* v. *McLaren,* 699 F. 2d 401 (7th Cir. 1983), it was held that a plaintiff who accepted a $1.00 offer of judgment that did not include attorney's fees, was *not* a prevailing party under § 1988. As the plaintiff had attained no success on the merits, he could not claim fees under § 1988. Further, the Seventh Circuit held that no fee could be awarded under Rule 68 if the offer had not included attorney's fees, which the defendants had not offered in *Pigeaud.*

519 F. Supp. 309, 310 (N.D. Ill. 1981). Because of the *Skoda* and *Chesny* opinions, both the "special circumstances" and the "offer of judgment" exceptions to the draconian force of § 1988 are now foreclosed in the Seventh Circuit. In consequence, the petitioners in the case at bar are exposed to almost a quarter million dollars in attorney's fee with no recourse. Only this Court can prevent this result from happening.

D. REVERSAL OF THE COURT BELOW WILL REMOVE PETITIONERS FROM UNWARRANTED JEOPARDY AND PRESERVE THE HARMONY BETWEEN SEC. 1988 AND RULE 68.

An offer of judgment which includes attorney's fees can terminate otherwise protracted litigation, such as the instant case, and force the plaintiff's attorney to look at his "hole card", before either proceeding to trial or settling. *Delta Air Lines, Inc.* v. *August,* 450 U.S. 346, 380 (1981) (Rehnquist, J. dissenting). Rule 68 can be an effective method of dispute resolution in civil rights cases, if it receives this Court's imprimatur. The increasing use of Rule 68 signals recognition of its potential usefulness in this era of national litigiousness. Footnote 15, *Supra.* Respectfully, rejection of Rule 68 here could be its death knell with no feasible alternative currently available.[18]

In the case at bar, the Seventh Circuit has chosen to devastate the one effective procedural method defendants have available in civil rights cases to resolve litigation fairly. Ignoring the express language of § 1988, the Seventh Circuit's opinion seems oblivious of the rectitude of petitioners' offer of judgment which exceeded the sum of the verdict and fees respondent and his attorney have now accepted and spent. The *ratio decendi* of the opinion here on review is the appellate court's expressed view of public policy. This view places petitioners in serious jeopardy but produces no concomitant public benefit.

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[18] Petitioners presume that consideration of the proposed new Rule 68 has been shelved at this time.

The Seventh Circuit's opinion provides plaintiff's civil rights attorneys with an impetus to dishonor the policy behind § 1988 as well as the policy behind the Federal Rules of Civil Procedure, particularly Rule 68. Without the inclusion of attorney's fees in "costs", the plaintiff's attorney will be subjected to a temptation he may not be able to resist. When a valid Rule 68 offer is made, even if realistic and acceptable to the plaintiff, his counsel is tempted to reject it. The attorney may protract the litigation and ignore a Rule 68 offer to increase his billable time. If he does so under the law in the Seventh Circuit, he will then be paid by the defendant even though he might only win $1.00 at trial. If this hypothetical attorney perceives even a remote possibility of recovering a verdict, although it would be less than the offer of judgment, he will keep the meter of billable time running. When the meter finally runs out, he can petition for a very large fee. This hypothetical plaintiff's attorney has little, if any, incentive to even consider the Rule 68 offer of judgment, even though valid. It is the view expressed in the Seventh Circuit's opinion that the only repercussion to a plaintiff who fails to accept a reasonable offer is the obligation to pay nominal deposition costs, postage, telephone and photocopy charges, incurred after the date of the offer of judgment. In the trial courts, those "costs" are insignificant when compared with the amount of the attorney's fees accrued during trial, even at reasonable hourly rates. The threat of having to absorb these insignificant "costs" is not sufficient incentive to settle cases. Note, *Offer of Judgment and Statutorily Authorized Attorney's Fees: A Reconciliation of the Scope and Purpose of Rule 68,* 16 Ga. L. Rev. 482 (1982). By extinguishing Rule 68 as a vigorous procedural rule, the Seventh Circuit opinion chooses to compensate those attorneys who have erred in assessing the merits of their case and who may, instead, have chosen to keep the clock running, rather than "secure the just, speedy and inexpensive determination of every action." Fed. R. Civ. P. 1.[19]

[19] Petitioners do not imply criticism of the conduct of respondent's attorney in the case at bar and believe that conduct was of the appropriate ethical and professional standards.

When a defendant in a civil rights case makes a valid offer of judgment, which includes attorney's fees, the defendant is not only complying with an important public policy of settling otherwise protracted litigation, but he is also complying fully with congressional policies underlying the Civil Rights Acts generally and § 1988 particularly. In the first instance, the offer of judgment by its very terms immediately elevates the plaintiff to the status of a prevailing party. The defendant is allowing "judgment to be taken against him for the money . . . specified in his offer, with costs then accrued." Fed. R. Civ. P. 68. Prior to the offer being conveyed to the plaintiff, the plaintiff has merely a possibility, but no assurance of winning ". . . for seldom can a prospective plaintiff be sure of ultimate success." *Christianburg Garment Co.* v. *EEOC,* 434 U.S. 412, 422 (1978). But when an offer of judgment is accepted, the offer of judgment has elevated the plaintiff to the posture of a "prevailing party". 42 U.S.C. § 1988. Once the defendant makes the plaintiff a prevailing party, the offer of "money or property or . . . effect specified in [the defendant's] offer, with costs then accrued . . ." should then vindicate the plaintiff's alleged civil rights violation and compensate the plaintiff's attorney. Fed. R. Civ. P. 68.

Careful reflection suggests that an offer of judgment should include the attorney's fees as "costs". *Scheriff* v. *Beck,* 452 F. Supp. 1254 (D. Colo. 1978). The defendant should receive a benefit commensurate with his burden in making an offer of fees. The defendant making an offer of judgment not only must forecast the reasonable value of the plaintiff's case on the merits, but must also calculate the approximate "costs", including fees, incurred by his opponent to the date of the offer of judgment. If the attorney for the defendant misjudges in this difficult effort, he exposes his client to the full liability of all attorney's fees of the prevailing plaintiff after a trial. To protect a defendant from post-offer fees would be just, after he carries this burden successfully.

If this Court were to reverse the Seventh Circuit, petitioners respectfully submit that unreasonably or ridiculously low Rule 68 offers would produce no threat to the Civil Rights Act. A low offer in practice will have the same effect as no offer, if the "costs" with attorney's fees are included in a Rule 68 offer. In the case of a low offer, plaintiff's "judgment finally obtained" with fees and costs can be expected to exceed the defendant's offer. Fees and costs will be awarded plaintiff under § 1988 as "prevailing party". To create an example from the facts of *Delta Air Lines, Inc.* v. *August,* 450 U.S. 346 (1981), if the defendant makes a small, $450 offer, even the sum of the attorney's fees plaintiff will have incurred before filing the complaint plus the filing fee for the complaint, will probably approach or exceed the $450 offered. In making such an offer, the defendant should know his offer is too low to merit consideration by the plaintiff and will be rejected. When plaintiff recovers even a nominal sum, such as $100, the defendant's $450 offer of judgment will not foreclose a fee award to the prevailing plaintiff. The plaintiff can confidently reject a frivolous offer, knowing that the defendant is still obligated to pay his attorney's fees through the completion of the case, because when the plaintiff prevails with a minimal judgment amount plus pre-offer fees he will exceed the Rule 68 offer. Plaintiff's civil rights will be vindicated and the policy of § 1988 will remain secure. If the amount of the pre-offer fees is contested, the court can resolve the issue as to amount and then determine whether the result is more favorable than the Rule 68 offer.

The Seventh Circuit retreated from the holding here suggested in part because of its concern with the Rules Enabling Act, 28 U.S.C. § 2072. After some expressed uncertainty, the Seventh Circuit opinion finally concludes that § 1988 attorney's fees are a "substantive", rather than "procedural" and cannot be abridged by Rule 68. A simple demonstration of this "substantive/procedural" theory in operation will show its flaw.

Assume that a defendant is awarded attorney's fees under Rule 37 (sanctions on motion to compel discovery) or Rule 11 (attorney's representations of good faith action by signing pleading) but that subsequently the civil rights plaintiff prevails at trial. When it comes time to pay Rule 11 or 37 fees to defendant, plaintiff's award of attorney's fees could not be reduced by the amount he owes the defendant, because plaintiff's "substantive" right to fees cannot be jeopardized or diminished by any Federal Rule of Civil Procedure. This would be the logic of the "substantive/procedural" theory. But a district court cannot be denied all discretion to set off fees due the defendant without dismantling Rule 11 or 37. Clearly, procedures can, and must impinge on "substantive" rights. So long as the "substantive" right is duly honored, it can be effected by procedure in accord with the Rules Enabling Act. 28 U.S.C. § 2072.

Although not overtly expressed in the opinion, the Seventh Circuit seems to be concerned over the possible chilling effect that the district court's ruling would have on civil rights cases. The Circuit Court suggests a dilemma of forcing plaintiff's civil rights attorneys "to think very hard before rejecting [an offer of judgment] even if they consider it inadequate, knowing that rejection could cost themselves or their client a lot if it turned out to be a mistake" is too burdensome for plaintiff's civil rights attorneys, according to the opinion below. *Chesny* v. *Marek,* 720 F. 2d 474, 479 (7th Cir. 1983). The argument would be that plaintiff's civil rights attorneys will hesitate to undertake litigation, if their fees will be curtailed upon failing to beat an offer of judgment by even a few dollars. Petitioners do not believe this argument is true or persuasive. But if the assumption is correct, the answer to it is twofold. First, the plaintiff's attorney has seriously misjudged the case, if he leaves no margin for error in assessing the offer of judgment. Clearly an offer of judgment which includes attorney's fees and proves to be only a few dollars over the verdict plus fees is an offer based on a solid, accurate evaluation of the case. It makes the

plaintiff whole and compensates his attorney. For the plaintiff's attorney to reject such an offer suggests that the attorney is either gambling needlessly or is unable to evaluate his case.

Petitioner's second response to the Circuit Court's dilemma consists of a principle respectfully submitted for this Court's consideration: the Federal Rules of Civil Procedure should apply without exception to all litigants, not just some. Consistent with this principle, Rule 1 mandates uniform application of the Rules to "all suits of a civil nature" Fed. R. Civ. P. 1.[20] Truncating a federal procedural rule, as the Circuit Court has done, leaves the overburdened trial courts with little, if any, guide to whether that rule is inapplicable to some cases but is applicable to others.

Unless attorneys are forced to abide by the Federal Rules of Civil Procedure by "thinking very hard" about the fair settlement of their cases, civil rights cases will be litigated for the sake of fees, not the vindication of civil rights. If the denial of post-offer fees to an attorney, who receives less on verdict than the offer, can be labeled unfair, it is an unfairness present in any lawsuit where there is a winner and loser. We should remember that the defendant also is running a risk of a verdict for plaintiff which exceeds the offer by even a few dollars. The defendant then must pay all fees of plaintiff's attorney. All litigants should be bound by § 1988 which Congress has enacted with an express definition of attorney's fees "as part of the costs."

The courthouse is still open to any individual who chooses to bring a civil rights lawsuit for the vindication of his or her rights. Competent legal counsel will still be attracted to civil rights cases by the assurance that their attorney's fees will be included as part of an offer of judgment, whether it be by settlement or verdict. As this Court notes in *Owen* v. *City of*

[20] Rule 81 has exceptions to Rule 1, but Rule 81 does not exempt any civil rights case from coverage of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 81.

Independence, 445 U.S. 622, 654 (1980), "elemental notions of fairness dictate that one who causes a loss should bear the loss." It follows that the plaintiff's attorney who misjudges and unreasonably protracts litigation causes a loss to his client. Accordingly he should bear the loss of his fees, if he has refused a more favorable offer of under Rule 68.

E. NUMEROUS CIRCUIT COURTS AND DISTRICT COURTS THROUGHOUT THE UNITED STATES HAVE APPLIED RULE 68 IN A HARMONIOUS AND LEGALLY SOUND MANNER TO CIVIL RIGHTS CASES.

In deciding *Chesny* v. *Marek,* 720 F. 2d 474 (7th Cir. 1983) the Seventh Circuit held that a valid Rule 68 offer can include attorney's fees. The petitioners, according to the Seventh Circuit, have made a valid offer: the verdict of $60,000 plus the accrued pre-offer costs and attorney's fees of $32,000 was in sum less than the offer of $100,000.

After finding that all prerequisites to a valid offer have been met by the petitioners' offer of judgment, the Seventh Circuit concludes that this valid offer of judgment should not defeat the congressional policy of awarding all fees to a prevailing party, regardless of the Federal Rules of Civil Procedure. In so holding, the opinion asserts a belief that Rule 68 is inappropriate in a civil rights context because it is "little known and little used." *Chesny* v. *Marek,* 720 F. 2d 474, 475, 479 (7th Cir. 1983).

This conclusion and the opinion of which it is a part ignores a substantial body of case law which has developed during the past fifteen years and which has addressed the issue of Rule 68's impact in a variety of fee shifting contexts. The opinion is silent about contrary conclusions reached by several district courts. Further, the opinion would distinguish the case at bar from the denial of § 1988 fees in the Sixth Circuit to a plaintiff by operation of a Rule 68 offer of judgment. *Fulps* v. *City of Springfield,* 715 F. 2d 1088 (6th Cir. 1983).

First, in examining early district court cases, two cases which discuss Rule 68, do not lend support to an argument that attorney's fees are not part of "costs" in this case. In *Gamlen Chemical Co.* v. *Dacar Chemical Products Co.*, 5 F.R.D. 215 (W.D. Pa. 1946), plaintiff had accepted an offer of judgment which did not mention attorney's fees, in a copyright infringement case and then applied to the court for fees. The court held that the fees must be specifically mentioned in the offer of judgment. Next, *Cruz* v. *Pacific American Insurance Corp.*, 337 F. 2d 746 (9th Cir. 1964) held that under the Guam offer of compromise statute, Guam Code Civ. P. § 997, the defendant need not pay attorney's fees as part of the costs, if defendant had not agreed to do so in the offer. *Cruz* is not precedent in an analysis of Rule 68 at this time. The Guam statute, while similar to Rule 68 in language, does not require that the offer include costs then accrued. More recently, in *Waters* v. *Heublein, Inc.*, 435 F. Supp. 110 (N.D. Cal. 1979), the district court rejected the Ninth Circuit's rationale in *Cruz* as not controlling, even though the district court is bound by Ninth Circuit decisions. *See, Chesny* v. *Marek*, 547 F. Supp. 542, 546 n. 3 (N.D. Ill. 1982).

After the passage of § 1988 in 1976, district courts were increasingly faced with Rule 68's impact on the new legislation. In 1978, the Colorado district court held in *Scheriff* v. *Beck*, 452 F. Supp. 1254 (D. Colo. 1978), that if an offer of judgment excludes attorney's fees as part of the costs, the offer of judgment is invalid. In following *Scheriff* v. *Beck*, the Northern District of California held in *Waters* v. *Heublein, Inc.*, 485 F. Supp. 110 (N.D. Cal. 1979) that an offer of judgment for costs then accrued should include attorney's fees. Further, the court held that if the judgment finally obtained does not exceed the offer, Rule 68 will bar the recovery of the fees after the date of the offer. The rationale of the court in *Waters* v. *Heublein* is persuasive:

> Rule 68 is designed to prevent needless litigation by punishing a party that chooses to reject a reasonable settlement offer. Awarding fees covering their pre-offer work to attorneys who settle cases through acceptance of an offer of judgment advances the purposes underlying the fees provision. On the other hand, applying Rule 68 to bar the recovery of post-offer fees in a case in which a party has rejected a reasonable offer that ultimately exceeds the judgment does not unduly interfere with the operation of this provision. Since the pre-offer efforts of the attorney reached a result more favorable to the client than the verdict, there seems little reason to reward that attorney for the post-offer work necessitated by a mistaken judgment that failed to obtain any additional benefits. Thus, this application of the Rule should work to further the legitimate concerns of judicial economy and efficiency without discouraging attorneys from pursuing civil rights litigation. *Id.* at 114-5.

While discounting Rule 68 offers of judgment, the Circuit Court in *Chesny* v. *Marek*, amazingly never mentions *Waters* v. *Heublein*, even though the district court opinion it reverses extensively discusses *Waters* as persuasive authority.

The Seventh Circuit opinion ultimately seems to rely on this Court's holding in *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752 (1980). In *Roadway Express*, this Court held that in the context of 28 U.S.C. § 1927, attorney's fees would not be included as part of the costs in a civil rights case where the plaintiff's attorney had "so multiplied the proceedings in any case as to increase costs unreasonably and vexatiously". 28 U.S.C. § 1927. The opinion below makes the quantum leap to conclude: "No more should 'costs' in Rule 68 be read to include attorney's fees in such a case." *Chesny* v. *Marek*, 720 F. 2d 474, 480 (7th Cir. 1983). In so holding, the Circuit Court not only misapplies the holding of *Roadway Express*, but also misses this Court's reasoning in *Hutto* v. *Finney*, 437 U.S. 678 (1978) and the statements of Justice Powell in *Delta Air Lines, Inc.* v. *August*, 450 U.S. 347 (1980) (Powell, J. concurring).

In *Roadway Express,* this Court was called upon to construe "costs" in § 1927 in conjunction with its companion section, § 1920. 28 U.S.C. § 1920 specifies with particularity, without mentioning attorney's fees, those costs which are ordinarily taxed to a losing litigant, such as marshal's fees, witness fees, copying costs, printing and court reporter costs. Since the Act itself defines the "costs" in § 1920, the Court had no reason to look beyond the Act for a definition of the costs which would include attorney's fees. This Court noted that the concept of punishing attorneys who multiply proceedings needlessly first appeared in 1813. The Act of February 26, 1853, 10 Stat. 161 later coupled the definition of costs (now found in § 1920) with the award of costs against attorneys who vexatiously multiply proceedings (now found in § 1927). Thus, this Court concludes that the sections must be read together, because of their history. The Circuit Court opinion in discussing *Roadway Express* glosses over the important distinction between the Federal Rules of Civil Procedure, which do not define costs, and § 1920, which does. In doing so, it fails to account for Justice Powell's concurring opinion in *Delta Air Lines v. August,* 450 U.S. 347, 364, n. 2 (1980) which interprets the Court's *Roadway Express* holding.[21] In *Delta Air Lines,* Justice Powell comments that attorney's fees are part of the costs in a Rule 68 offer of judgment situation and that the *Roadway Express* opinion is not contrary to his conclusion. In distinguishing §§ 1920 and 1927 from the Federal Rules of Civil Procedure, Justice Powell states: "In approving the Federal Rules, Congress appears to have incorporated the definition of costs found in the substantive statute at issue in the litigation." *Id.* at 364, n. 2.

In *Hutto* v. *Finney,* 437 U.S. 678 (1977), this Court notes the substantial number of "statutory and common-law situations in which allowable costs include counsel fees." *Id.* at 697. In holding that the Eleventh Amendment does not preclude the award of attorney's fees as part of the costs under § 1988 against a state official, the Court found that:

[21] Justice Powell is the author of the *Roadway Express* opinion.

> It is much too late to single out attorney's fees as the one kind of litigation cost whose recovery may not be authorized by Congress without an express statutory waiver of the States' immunity. *Id.* at 698.

In § 1988, Congress has clearly chosen to authorize this "litigation cost," within the context of the Federal Rules of Civil Procedure. It is unsupportable to contend, as the Seventh Circuit does, that a contemporaneous understanding of costs in 1938 did not include attorney's fees, when Rule 68 was enacted. Statutes in existence when Rule 68 was enacted did include attorney's fees as costs. Appendix A to this brief is a compilation of some of those statutes. The Seventh Circuit offers no justification to single out attorney's fees as the one kind of litigation cost exempt from the operation of Rule 68.

When Congress decided to enact a statute using the word "costs" to define attorney's fees, it drew upon two centuries of experience in drafting such language. *See,* Footnote 22 *infra.* Congress had 40 years, between the passage of Rule 68 and § 1988, to learn of this Federal Rule of Civil Procedure. To assume, as the Seventh Circuit does, that knowledge of Rule 68's language had not percolated into congressional awareness by 1976 would be, at best, implausible, if not frightening.

In a factually identical case to *Chesny* v. *Marek,* Judge Cannella of the Southern District of New York in *Lyons* v. *Cunningham* ____ F. Supp. ____, 79 Civ. 3953 (S.D. N.Y. Oct. 19, 1983, opinion to be published) has held that Rule 68 precludes the plaintiffs' recovery of attorney's fees, after rejection of an offer of judgment with a subsequent verdict less than the offer. Judge Cannella's comments are noteworthy. In citing *Hutto* v. *Finney* for the proposition that attorney's fees are an element of the costs and *Fairmont Creamery Co.* v. *Minnesota,* 275 U.S. 168 (1927) for the proposition that courts have authority to award attorney's fees to further the administration of justice, Judge Cannella sees the distinctions between attorney's fees and costs not to be particularly significant, either

historically or currently under § 1988.[22] *Lyons* v. *Cunningham*, pp. 18-19. In light of the express language of the Sen. Rep., 94-1011, this blurring of the distinctions between costs and fees by the inclusion of attorney's fees as one element of the costs is understandable. In setting out congressional intent for § 1988, the Senate Report 94-1011 at 5913 states:

> [D]efendants in these cases are often state or local bodies or state or local officials. In such cases it is intended that the attorneys' fees, *like other items of costs*, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the state or local government (whether or not the agency or government is named party.) (Emphasis added). (Footnotes omitted).

This stated legislative intent patently demonstrates that Congress intended these fees to be governed as if they were costs within the context and ambit of the Federal Rules of Civil Procedure.

In employing the same analysis, the Sixth Circuit Court of Appeal has rendered a decision actually contrary to that in *Chesny* v. *Marek*. *Fulps* v. *City of Springfield*, 715 F. 2d 1088 (6th Cir. 1983). In *Fulps*, the Sixth Circuit found that attorney's fees were clearly part of the costs under § 1988 in a case where an offer of judgment had been accepted. The judgment entered by the clerk recited the settlement amount of $2,500 for each of the two plaintiffs, "plus cost accrued to date of judgment." The plaintiff's attorney subsequently petitioned

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[22] Coupling attorney's fees as an element of the costs is a well-established and frequently exercised congressional activity. On March 1, 1793, Congress passed an Act since expired, that stated: "Sec. 4. And be it further enacted, That there be allowed and taxed in the supreme, circuit and district courts of the United States, in favour [sic] of the parties obtaining judgments therein, such compensation for their travel and attendance, and for attornies [sic] and counsellors' fees, except in the district courts in cases of admiralty and maritime jurisdiction, as are allowed in the supreme or superior courts of the respective states. 1 Stat. 419 (1793)

the district court for an award of his attorney's fees, arguing that the fees had not been included in the $5,000 total sum indicated in the offer of judgment. The plaintiff contended that the offer should be read as an offer to pay $5,000 plus costs plus attorney's fees. The defendant City of Springfield argued that they were only responsible for the § 1920 costs and not attorney's fees.

The Sixth Circuit held that "costs" as specified in Rule 68 must include attorney's fees "where the fees are authorized by the substantive statute at issue in the litigation." *Id.* at 1095. Relying on the language of *Hutto* v. *Finney* and finding that *Roadway Express* v. *Piper* was not inopposite to their holding, the Sixth Circuit concluded that "Congress expressly characterized fees as costs with the intent that the recovery of fees be governed by the substantive and procedural rules applicable to costs." *Id.* at 1093.

The opinion in the Seventh Circuit appears to reject *Fulps*. However, the Sixth Circuit did not rule as the Seventh Circuit suggests it had that Rule 68 "can be used to abrogate the right to attorney's fees that a plaintiff would otherwise have by virtue of § 1988." *Chesny* v. *Marek* at 480. The use of the term "abrogate" causes the point to be missed. The plaintiff's attorney receives all amounts due to him prior to the offer of judgment and thus there is no "abrogation". By refusing to follow the *Fulps* judicial definition of costs to include fees causes the court below to skirt the issue: Should post-offer fees be denied by operation of Rule 68?

In following the *Fulps* decision, a district court opinion in Connecticut has held that a Rule 68 offer of judgment will preclude the award of post-offer attorney's fees to the plaintiff's attorney, when he fails to recover more on verdict than the offer. *Bitsouni* v. *Sheraton Hartford Corp.*, 33 F.E.P. Cases 898 (D. Conn. 1983). While concerned that the plaintiff not be saddled with the obligation to pay the defendant's attorney's

fees, if the amount is not bettered by trial, the *Bitsouni* court had no trouble at all reaching the conclusion that the plaintiff's cost under Rule 68 will include his attorney's fees.

Another district court has strongly encouraged the idea of defendants submitting offers of judgment in order to toll the amounts civil rights plaintiffs could recover in fees after of the offer. *Neal* v. *Berman,* 576 F. Supp. 1250 (E.D. Mich. 1983). In *Neal,* the defendants had orally offered to settle the case. Defendant never put its settlement offer in writing. Plaintiff "prevailed" with a verdict amount which the defendants would have been willing to pay. In concluding that the time spent by the plaintiff's attorney at trial was unnecessary, the district court observed that the plaintiff would be denied fees for post-offer work, but for the fact that defendants had not submitted a formal, written settlement offer. *See also, Spero* v. *Abbott Laboratories,* 396 F. Supp. 321 (N.D. Ill. 1975).

II. WHEN THE TRIAL COURT DETERMINES THE AMOUNT TO BE AWARDED UNDER § 1988, IT SHOULD AWARD ONLY THAT PORTION OF A REASONABLE ATTORNEY'S FEE AMOUNT WHICH IS IN EXCESS OF THE AMOUNT THE PLAINTIFF HAS PAID HIS ATTORNEY UNDER AN ATTORNEY'S FEE CONTRACT.

Petitioners have argued in Point I of this brief in support of the district court opinion that by operation of Rule 68 no further fees at all are due respondent's attorney for his post-offer of judgment work. If petitioners' and the district court's view presented here is rejected, this case should be remanded for a determination of what, if any, fees additional to those already paid are appropriate. It is respectfully submitted that the district court on remand should scrutinize the previously undisclosed contingent fee agreement for fairness to determine what is a reasonable fee. Because respondent had not disclosed his fee agreement in the district court, that court had no occasion to consider the contingent fee which is already paid.

The contingent fee was paid under an agreement in this case which was not disclosed by respondent when the complaint was filed. J.A. A-46. As revealed during the appellate phase of this case, the terms of that contingent fee agreement provide a division between respondent and his attorney of "all amounts recovered". J.A. A-51. Respondent has treated the meaning of that phrase in the contract to include fees under § 1988 with 55% of the fee being paid to respondent and 45% being paid to his attorney. J.A. A-51. The pre-offer of judgment fees and costs here recoverable by § 1988 are established at $32,000.[23]

The respondent's attorney acknowledges that he retained 45% of the $32,000 paid by petitioner as fees, as well as 45% of the $60,000 paid by petitioners in satisfaction of judgment on verdict (J.A. A-52). The resulting sum in total is $41,400 in attorney's fees received. J.A. A-48. It was approximately one year after receiving these fees that respondent's attorney first admitted (in response to a question from the court during oral argument on appeal) that a contingent fee agreement did, in fact, exist. Pet. A. A-6.

Petitioners advocate that respondent's fully executed contingent fee contract be honored, not abolished. While district courts may review the reasonableness of a fee agreement, an attorney and a client nevertheless have a right to execute contingent fee agreements. *Rosquist* v. *SooLine Railroad,* 692 F. 2d 1107 (7th Cir. 1982); *Krause* v. *Rhode,* 640 F. 2d 214 (9th Cir. 1981); *Sargeant* v. *Sharp,* 579 F. 2d 645 (1st Cir. 1978). Petitioners submit that a frustration of the district court's review of the fee contract by non-disclosure of its existence defeats justice. Contingent fee contracts to the extent they establish a "reasonable attorney's fee" under § 1988 prevent a windfall profit being paid to a prevailing plaintiff's attorney.

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[23] Respondent's attorney and petitioners' attorney agreed to reduce respondent's fee demand from $34,392.35 to $32,000, although respondent continued to request a multiplier to this lodestar amount. Judge Shadur denied the multiplier. J.A. A-24-25.

In asserting the existence of a congressional policy of disfavor for unjust enrichment of respondent's attorney, petitioners cite as authority Sen. Rep. 94-1011. That Senate record establishes the congressional goal of attracting and compensating competent attorneys in civil rights cases. The Senate Report admonishes that "windfall" fees should not be awarded to counsel. Sen. Rep. 94-1011 at 5908. Civil rights attorneys are expected by Congress and the courts to advocate against civil rights violations. But Congress does not intend that attorney's launch their own private, capital ventures under the guise of § 1988. *Brown* v. *Stackler,* 612 F. 2d 1057 (7th Cir. 1980).

This Court has now established in *Hensley* v. *Eckerhart,* 103 S. Ct. 1933 (1983) that the § 1988 fee award must be reasonable. This Court has stated that "the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.* at 1940. By their very nature, contingent fees are inexorably linked to "relief obtained" in behalf of the client. In calculating the reasonableness of a fee, it is not surprising to learn that one of the factors which should be considered by district courts is the contingent fee agreement between the prevailing plaintiff and his attorney. *Johnson* v. *Georgia Highway Express, Inc.,* 488 F. 2d 714 (5th Cir. 1974). Some circuits have even gone so far as to hold that compensation paid to attorneys through a percentage of judgment on verdict is a basis sufficient to deny § 1988 fees. *See, Buxton* v. *Patel,* 595 F. 2d 1182 (9th Cir. 1979); *Zarcone* v. *Perry,* 581 F. 2d 1039 (2d Cir. 1978); *contra, Cooper* v. *Singer,* 719 F. 2d 1496 (10th Cir. 1983).

In the case at bar, respondent's attorney has been awarded by the district court $32,000 as his § 1988 reasonable, pre-offer of judgment fee. However, he has actually been paid by his

client $41,400 to date.[24] In calculating the reasonableness of this amount in the face of the contingent fee, the jury verdict in this case warrants analysis. An itemized verdict was reached in this case. (R. 119). The jury found that the civil rights violation standing alone justified a verdict of $52,000. Punitive damages of $1,000 under analogy to a common law tort cause were assessed against each of the three police officers. Compensatory damages of $5,000 under analogy to the Illinois Wrongful Death Act were assessed. Thus, it could be realistically argued that, the "pure" § 1983 cause of action, i.e. "violation of civil rights", produced for the respondent by judgement on verdict $52,000 (or $60,000, if the offer of judgment had been accepted[25]).

It cost $32,000 in pre-offer fees to obtain that $52,000. The contingent fee paid cannot be disregarded in measuring a reasonable fee under § 1988. The wrongful death cause at $5,000, and the punitive cause at $3,000, on a 45% contingent fee basis cost $3,600 to produce. While these latter two actions were prosecuted under § 1983, they were cognizable under state law where common law tort actions have always been a means to vindicate individual rights. The $32,000 statutory fee looked at in conjunction with the 45% contingent fee should demonstrate that reasonableness in awarding § 1988 fees mandates factoring the contingent fees paid into the trial court's decision.

Contingent fee payments under this analysis can operate as a limitation on fees awards under § 1988. This limitation would depend on how successful in a monetary sense a plaintiff is.

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[24] Respondent had asked the jury for $3,500,000 in damages. Had the verdict followed respondent's request, respondent's attorney would have recovered $1,575,000 in fees (45% of $3,500,000). It would seem only equitable that any sum previously recovered under such contingent fees contracts must be disclosed by plaintiff and then be factored in by the district court in deciding fees under the *Johnson* and *Hensley* guidelines.

[25] The $100,000 offer minus the $8,000 for death and punitive damages and minus the $32,000 fee leaves $60,000 for the civil rights violation.

The success factor has been recognized in *Hensley* v. *Eckerhart.* In the case at bar the result cannot be claimed to be "excellent". Excellent results may justify full, compensatory fees. Conversely, under *Hensley,* limited achievement justifies reductions in fees. Especially here, since the "success" of respondent is partial at best in the face of a $100,000 offer of judgment made long before trial, the attorney's fees received under the contingent fee agreement should cause the district court to limit or reduce any additional fees which otherwise might be awarded now. The amount of that reduction should be established by the trial court's sound discretion. Respondent's attorney has been awarded to date $32,000 as § 1988 attorney's fees. He credited 55% of that sum to his client. Nevertheless, he is also entitled to 45% ($27,000) from the $60,000 verdict, because of the terms of the contingent fee contract. The contract, respondent attorney has asserted, provides that he and his client (not a lawyer) split "all amounts recovered", including attorney's fees, on a 45%/55% basis, and that is what they have done (J.A. 52). A fee agreement in a civil rights case should expressly deal with fees under § 1988 and the impact of the award on the agreement. The opinion in *Cooper* v. *Singer,* 710 F. 2d 1496 (10th Cir. 1983) by use of sound reasoning has held this to be the law. Since the instant fee contract is silent about § 1988 fees, the district court must decide any additional § 1988 fees in light of fees already paid to respondent's attorneys under the contingent fee agreement.

The fee issue on this contingent agreement is not a question of prospective payments. There has been a $27,000 payment to respondent subject to the attorney's fee (as part of the payment of the $60,000 judgment). It was earmarked for attorney's fees because of the contingent fee contract. Petitioners submit that the $27,000 paid and available to respondent's lawyer as attorney's fees can only be a windfall profit, when stacked on top of the $32,000 paid in § 1988 fees by petitioners. The sum of these two amounts is $59,000, and every penny of it came from petitioners. The fact that the respondent's attorney only

took $41,400 and credited the balance of the $59,000 to his client does not justify an assessment against petitioners of an additional fee award over and above the $59,000 which already has been funded by petitioners. The contingent fee contract should be a factor used in arriving at a reasonable fee award and this should be done in a manner consistent with the policy of § 1988 as defined by *Hensley* v. *Eckerhart,* ____ U.S. ____, 103, S. Ct. 1933 (1983).

CONCLUSION

The petitioners respectfully request affirmance of the district court and reversal of the circuit court in the award of costs including attorney's fees under 42 U.S.C. § 1988. Petitioners further request a finding of law that no fees or other costs incurred after the offer of judgment be awarded to respondents. Petitioners further request that the taxable costs of petitioners before the circuit court and before this Court be awarded to petitioners against respondent, with this suit to be remanded solely for the award of those taxable costs by the circuit court which are not included by the Clerk of the Supreme Court in the mandate to the courts below. In the alternative, petitioners respectfully request directions issue to the district court on remand to consider the contingent fees paid in awarding additional fees, if any.

Respectively submitted,

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APPENDIX

APPENDIX A

STATUTES IN EXISTENCE IN 1938 WHICH ALLOW ATTORNEY'S FEES AS PART OF THE COSTS

CLAYTON ACT, 15 U.S.C. § 15

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

enacted Oct. 15, 1914; no amendments

CLAYTON ACT, 15 U.S.C. § 15(b)

Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

enacted Oct. 15, 1914; no amendments.

COMMUNICATIONS ACT OF 1934, 47 U.S.C. § 206

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

enacted June 19, 1934; no amendments.

COMMUNICATIONS ACT OF 1934, 47 U.S.C. § 407

If the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

enacted June 19, 1934, no amendments.

COPYRIGHT ACT OF 1909, 17 U.S.C. § 40

Court may "award to the prevailing party a reasonable attorney's fee as part of the costs."

enacted 1909, amended 1976

FEDERAL POWER ACT, 16 U.S.C. § 825q-1(b)(2)

The Commission may, under rules promulated by it, provide compensation for reasonable attorney's fees, expert witness fees, and other costs of intervening or participating in any proceeding before the Commission to any person whose intervention or participation substantially contributed to the approval, in whole or in part, of a position advocated by such person. Such compensation may be paid only if the Commission has determined that—

(A) the proceeding is significant, and

(B) such person's intervention or participation in such proceeding without receipt of compensation constitutes a significant financial hardship to him.

enacted June 10, 1920, as added Nov. 9, 1978.

FEDERAL TRADE COMMISSION IMPROVEMENT ACT, 15 U.S.C. § 57a(h)(1)

(1) The Commission may, pursuant to rules prescribed by it, provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating in a rulemaking proceeding under this section.

enacted Sept. 26, 1914, as added Jan. 4, 1975.

HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976, 15 U.S.C. § 15c(a)(2)

The court shall award the State as monetary relief threefold the total damage sustained as described in paragraph (1) of this subsection, and the cost of suit, including a reasonable attorney's fee.

enacted Oct. 15, 1914, as added Dec. 2, 1980.

HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976, 15 U.S.C. § 26.

In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

enacted Oct. 14, 1914; amended Sept. 30, 1976 to include attorney's fees.

MERCHANT MARINE ACT OF 1936, 46 U.S.C. § 1227

Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a resonable attorney's fee.

enacted June 29, 1936; no amendments.

PACKERS AND STOCKYARDS ACT, 7 U.S.C. § 210(f)

If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as part of the costs of the suit.

enacted Aug. 15, 1921; no amendments.

PERISHABLE AGRICULTURAL COMMODITIES ACT, 7 U.S.C. § 499g(b), (c)

(b) If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit.

(c) Appellee shall not be liable for costs in said court and if appellee prevails he shall be allowed a reasonable attorney's fee to be taxed and collected as part of his costs.

enacted June 10, 1930; no amendments.

RAILWAY LABOR ACT, 45 U.S.C. § 153(p)

If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit.

enacted May 20, 1926; no amendments.

SECURITIES ACT OF 1933, 15 U.S.C. § 77k(e)

In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

enacted May 27, 1933; no amendments.

SECURITIES EXCHANGE ACT, 15 U.S.C. § 78i(e)

In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

enacted June 6, 1934; no amendments.

SECURITIES EXCHANGE ACT, 15 U.S.C. § 78r(a)

In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

enacted June 6, 1934; no amendments.

TRUST INDENTURE ACT, 15 U.S.C. § 77ooo(e), www(a)

ooo(e) The indenture to be qualified may contain provisions to the effect that all parties thereto, including the indenture security holders, agree that the court may in its discretion require, in any suit for the enforcement of any right or remedy under such indenture, or in any suit against the trustee for any action taken or omitted by it as trustee, the filing by any party litigant in such suit of an undertaking to pay the costs of such suit, and that such court may in its discretion assess reasonable costs, including reasonable attorney's fees against any party litigant in such suit, having due regard to the merits and good faith of the claims or defenses made by such party litigant . . . .

www(a) In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit and assess reasonable costs, including reasonable attorneys' fees, against either party litigant, having due regard to the merits and good faith of the suit or defense.

enacted May 27, 1933, as added Aug. 3, 1939.

UNFAIR COMPETITION ACT, 15 U.S.C. § 72

Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section . . . shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee.

enacted Sept. 8, 1916; no amendments.

APPENDIX B

FEDERAL STATUTES AUTHORIZING THE AWARD OF ATTORNEY'S FEES AS COSTS, IN ADDITION TO THOSE PREVIOUSLY LISTED IN APPENDIX A.

ACT TO PREVENT POLLUTION FROM SHIPS, 33 U.S.C. § 1910(d)

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party including the Federal Government.

enacted Oct. 21, 1980; no amendments

AGRICULTURAL UNFAIR TRADE PRACTICES, 7 U.S.C. § 2305

In any action commenced pursuant hereto, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

enacted April 16, 1968; no amendments

BANK HOLDING COMPANY ACT, 12 U.S.C. § 1975

Any person who is injured in his business or property by reason of anything forbidden in . . . this title . . . shall be entitled to recover three times the amount of the damages sustained by him, and the cost of suit, including a reasonable attorney's fee.

enacted Dec. 3, 1970; no amendments

CIVIL RIGHTS ACT OF 1964, TITLE II, 42 U.S.C. § 2000a-3(b)

In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other

than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.

enacted July 2, 1964; no amendments

CIVIL RIGHTS ACT OF 1964, TITLE VII, 42 U.S.C. § 2000e-5(k)

In any action or proceeding under this subschapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

enacted July 2, 1964; no amendments

CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT of 1976, 42 U.S.C. § 1988

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], or title VI, the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

enacted Oct. Oct. 19, 1976; amended Oct. 21, 1980, deleting reference to Internal Revenue Code.

CLEAN AIR ACT, 42 U.S.C. § 7413(b)

In the case of any action brought by the Administrator under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to the party or parties against whom such action was brought in any case where the court finds that such action was unreasonable.

enacted July 14, 1955; no amendments

CLEAN AIR ACT, 42 U.S.C. § 7604(d)

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorneys and expert witness fees) to any party, whenever the court determines such award is appropriate.

enacted July 14, 1955; no amendments.

CLEAR AIR ACT, 42 U.S.C. § 7607(f)

In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

enacted July 14, 1955; no amendments.

CLEAN AIR ACT, 42 U.S.C. § 7622(b)(2)(B)

If an order is issued under this paragraph, the Secretary, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

enacted July 14, 1955; no amendments.

CLEAN AIR ACT AMENDMENT OF 1970, 42 U.S.C. § 1857h-2(d)

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

enacted July 14, 1955, as added in Dec. 31, 1970.

CONSUMER PRODUCT SAFETY ACT, 15 U.S.C. § 2060(c)

A court may in the interest of justice include in such relief an award of the costs of suit, including reasonable attorneys' fees (determined in accordance with subsection (f) of this section and reasonable expert witnesses' fees.

enacted Oct. 27, 1972; amended May 11, 1976 to include award of attorneys' fees.

CONSUMER PRODUCT SAFETY ACT, 15 U.S.C. § 2072(a), (b)

(a) Any person who shall sustain injury by reason of any knowing (including willful) violation of a consumer product safety rule ... may, if the court determines it to be in the interest of justice, recover the costs of suit, including reasonable attorneys' fees (determined in accordance with section 2060(f) of this title) and reasonable expert witnesses' fees: *Provided,* That the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and cost, unless such action is brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision is made in a statute of the United States, in any case in which the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

enacted Oct. 27, 1972; amended in 1976 and 1980 to include "interest of justice" and minimum amount in controversy, respectively.

CONSUMER PRODUCT SAFETY ACT, 15 U.S.C. § 2073

In any action under this section the court, may in the interest of justice award the costs of suit, including reasonable attorneys' fees (determined in accordance with section 2060(f) of this title) and reasonable expert witnesses fees.

enacted Oct. 27, 1972; amended in 1976, substituting "interest of justice" for prevailing party standard.

COPYRIGHT ACT, 17 U.S.C. § 505

Except as otherwise provided by this title, the court may also award a reasonable attorneys' fee to the prevailing party as part of the costs.

enacted Oct. 19, 1976; no amendments.

DEEP SEABED HARD MINERAL RESOURCES ACT, 30 U.S.C. § 1427(c)

The court, in issuing any final order in any action brought under subsection (a) of this section, may award costs of litigation, including reasonable attorney and expert witness fees, to any party whenever the court determines that such an award is appropriate.

enacted June 12, 1980; no amendments.

ENDANGERED SPECIES ACT, 16 U.S.C. § 1540(g)(4)

The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

enacted Dec. 28, 1973; no amendments.

ENERGY POLICY AND CONSERVATION ACT, 42 U.S.C. § 6305(d)

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

enacted Dec. 22, 1975; no amendments.

ENERGY REORGANIZATION ACT OF 1974, 42 U.S.C. § 5851(e)2

The court, in issuing any final order under this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

enacted Nov. 6, 1978; no amendments.

ETHICS IN GOVERNMENT ACT OF 1978, 2 U.S.C. § 288i(d)

The Senate may by resolution authorize the reimbursement of any Member, officer, or employee of the Senate who is not represented by the Counsel for fees and costs, including attorneys' fees, reasonably incurred in obtaining representation.

enacted Oct. 26, 1978, no amendments.

FEDERAL MINE SAFETY AND HEALTH ACT, 30 U.S.C. § 815(c)(3)

Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and

prosecution of such proceedings shall be assessed against the person committing such violation.

enacted Dec. 30, 1969; no amendments.

FEDERAL MINE SAFETY AND HEALTH ACT, 30 U.S.C. § 938(c)

Whenever an order is issued under this subsection granting relief to a miner at the request of such miner, a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees) as determined by the Secretary to have been reasonably incurred by such miner for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the person committing the violation.

enacted Dec. 30, 1976, as added May 19, 1972

FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 33 U.S.C. § 1365(d)

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

enacted June 30, 1948, as added Oct. 18, 1972.

FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, 50 U.S.C. § 1810(c)

An aggrieved person, other than a foreign power or an agent of a foreign power, as defined in section 1801(a) or (b)(1)(A) of this title, respectively, who has been subjected to an electronic surveillance or about whom information obtained by electronic surveillance of such person has been disclosed or used in violation of section 1809 of this title shall have a cause of action against any person who committed such violation and shall be entitled to recover—

(c) reasonable attorney's fees and other investigation and litigation costs reasonably incurred.

enacted Oct. 25, 1978; no amendments.

GOVERNMENT IN THE SUNSHINE ACT, 5 U.S.C. § 552b(i)

The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (g) or (h) of this section, except that costs may be assessed against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes.

enacted Sept. 13, 1976; no amendments.

HOBBY PROTECTION ACT, 15 U.S.C. § 2102

In any such action, the court may award the costs of the suit, including reasonable attorneys' fees.

enacted Nov. 29, 1973; no amendments.

JEWELERS HALL-MARK ACT, 15 U S.C. § 298(b), (c), (d)

(b) Any competitor, customer or competitor of a customer of any person in violation of . . . this title, or any subsequent purchaser of an article of merchandise which has been the subject of a violation . . . of this title . . . shall recover damages and the cost of suit, including a reasonable attorney's fee.

(c) Any duly organized and existing jewelry trade association shall be entitled to injunctive relief restraining any person in violation . . . of this title from further violation . . . and if successful shall recover the cost of suit, including a reasonable attorney's fee.

(d) Any defendant against whom a civil action is brought under the provisions of . . . this title shall be entitled to recover the cost of defending the suit, including a reasonable attorney's fee, in the event such action is terminated without a finding by the court that such defendant is or has been in violation of . . . this title.

enacted Nov. 2, 1978; amended Jan. 12, 1983 to award attorney's fees under listed conditions.

JURY SYSTEM IMPROVEMENT ACT OF 1978, 28 U.S.C. § 1875(d)(2)

In any action or proceeding under this section, the court may award a prevailing employee who brings such action by retained counsel a reasonable attorney's fee as part of the costs. The court may tax a defendant employer, as costs payable to the court, the attorney fees and expenses incurred on behalf of a prevailing employee, where such costs were expended by the court pursuant to paragraph (1) of this subsection. The court may award a prevailing employer a reasonable attorney's fee as part of the costs only if the court finds that the action is frivolous, vexatious, or brought in bad faith.

enacted Nov. 2, 1978; amended Jan. 12, 1983 to award attorney's fees under listed conditions.

MAGNUSON-MOSS WARRANTY ACT, 15 U.S.C. § 2310(d)2

If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorney's fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

enacted Jan. 4, 1975; no amendments.

MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT, 33 U.S.C. § 1415(g)(4)

The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

enacted Oct. 23, 1972; no amendments.

NATIONAL HISTORIC PRESERVATIONS ACT, 16 U.S.C. § 470w-4

In any civil action brought in any United States district court by any interested person to enforce the provisions of this subchapter, if such person substantially prevails in such action, the court may award attorneys' fees, expert witness fees, and other costs of participating in such action, as the court deems reasonable.

enacted Oct. 15, 1966, as added Dec. 12, 1980.

NOISE CONTROL ACT OF 1972, 42 U.S.C. § 4911(d)

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such an award is appropriate.

enacted Oct. 27, 1972; no amendments.

OCEAN DUMPING ACT, 33 U.S.C. § 1415(g)(4)

The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

enacted Oct. 23, 1972; no amendments.

ORGANIZED CRIME CONTROL ACT OF 1970, 18 U.S.C. § 1964(c)

Any person injured in his business or property by reason of a violation ... of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

enacted Oct. 15, 1970; no amendments.

OUTER CONTINENTAL SHELF LANDS ACT, 43 U.S.C. § 1349(a)(5)

A court, in issuing any final order in any action brought pursuant to subsection (a)(1) or subsection (c) of this section, may award costs of litigation, including reasonable attorney and expert witness fees, to any party, whenever such court determines such award is appropriate.

enacted Aug. 7, 1953, as added Sept. 18, 1978.

POWER PLANT AND INDUSTRIAL FUEL USE ACT OF 1978, 42 U.S.C. § 8435(d)

The court, in issuing any final order in any action brought under subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

enacted Nov. 9, 1978; no amendments.

PRIVACY ACT OF 1974, 5 U.S.C. § 552a(g)(2)(B), (3)(B)

(2)(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

enacted Dec. 31, 1974; no amendments.

RAILROAD REVITALIZATION AND REFORM ACT, 45 U.S.C. § 854(g)

The United States shall indemnify the Corporation, its Board of Directors, and its individual directors against all costs and expenses (including fees of accountants, experts, and attorneys) actually and reasonably incurred in defending any litigation testing the legal validity of any security, obligation, agreement, or transaction, given, issued, or entered into pursuant to such subsection (e) of this section.

enacted Feb. 5, 1976; no amendments.

REAL ESTATE SETTLEMENT PROCEDURES ACT, 12 U.S.C. § 2607(d)

In any successful action to enforce the liability under this paragraph, the court may award the court costs of the action together with a reasonable attorney's fee as determined by the court.

enacted Dec. 22, 1974; no amendments.

REHABILITATION ACT OF 1973, 29 U.S.C. § 794a(b)

In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

enacted Sept. 26, 1973, as added Nov. 6, 1978.

SAFE DRINKING WATER ACT, 42 U.S.C. § 300j-8(d)

The court, in issuing any final order in any action brought under subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such an award is appropriate.

enacted June 1, 1944; no amendments.

SOLID WASTE DISPOSAL ACT, 42 U.S.C. § 6971(c)

(c) Whenever an order is issued under this section to abate such violation, at the request of the applicant, a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees) as determined by the Secretary of Labor, to have been reasonably incurred by the applicant for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the person committing such violation.

enacted Oct. 21, 1976; no amendments.

SOLID WASTE DISPOSAL ACT, 42 U.S.C. § 6972(e)

(e) The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such an award is appropriate.

enacted Oct. 21, 1976; amended Nov. 8, 1978 to include award of attorney's fees.

SURFACE MINING CONTROL AND RECLAMATION ACT, 30 U.S.C. § 1270(d)

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of

litigation, (including attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

enacted Aug. 3, 1977; no amendments.

SURFACE MINING CONTROL AND RECLAMATION ACT, 30 U.S.C. § 1275(e)

Whenever an order is issued under this section, or as a result of any administrative proceeding under this chapter, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings, including any judicial review or the Secretary, resulting from administrative proceedings, deems proper.

enacted Aug. 3, 1977; no amendments.

SURFACE MINING CONTROL AND RECLAMATION ACT, 30 U.S.C. § 1293(c)

Whenever an order is issued under this section to abate any violation, at the request of the applicant a sum equal to the aggregate amount of all costs and expenses (including attorneys' fees) to have been reasonably incurred by the applicant for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the persons committing the violation.

enacted Aug. 3, 1977; no amendments.

TOXIC SUBSTANCE CONTROL ACT, 15 U.S.C. § 2605(c)(4)(A)

The Administrator may, pursuant to rules prescribed by the Administrator, provide compensation for reasonable attorneys' fees, expert witness fees, and other costs of participating in a rulemaking proceeding for the promulgation of a rule under subsection (a) of this section . . . .

enacted Oct. 11, 1976; no amendments.

TOXIC SUBSTANCE CONTROL ACT, 15 U.S.C. § 2622(b)(2)(B)

If such an order issued, the Secretary, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' fees) reasonably incurred, as determined by the Secretary by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

enacted Oct. 11, 1976; no amendments.

VOTING RIGHTS ACT AMENDMENTS OF 1975, 42 U.S.C. § 19731(c)

In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

enacted Aug. 6, 1965; amended Aug. 6, 1975 to include award of attorney's fees.

WATER POLLUTION PREVENTION AND CONTROL ACT, 33 U.S.C. § 1365(d)

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

enacted June 30, 1948, as added Oct. 18, 1972.

WATER POLLUTION PREVENTION AND CONTROL ACT, 33 U.S.C. § 1367

Whenever an order is issued under this section to abate such violation, at the request of the applicant, a sum equal to

the aggregate amount of all costs and expenses (including the attorney's fees) as determined by the Secretary of Labor, to have been reasonably incurred by the applicant for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the person committing such violation.

enacted June 30, 1948, as added Oct. 18, 1972.

WIRE INTERCEPTION ACT, 18 U.S.C. § 2520

Any person whose wire or oral communication is intercepted, . . . shall (1) have a civil cause of action against any person who intercepts, . . . and (2) be entitled to recover from any such person—

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

enacted June 19, 1968; no amendments.